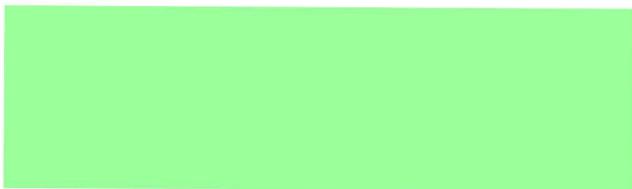


(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



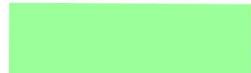
U.S. Citizenship
and Immigration
Services



DATE: OCT 31 2013

OFFICE: TEXAS SERVICE CENTER

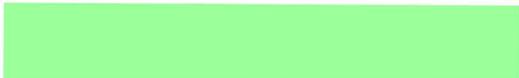
FILE:



IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Professional and Skilled Worker Pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on the petitioner's motion to reopen and reconsider. The motion will be granted, the AAO's decision will be affirmed, and the petition will remain denied.

The petitioner is a sole proprietorship that repairs watches and clocks, and sells watches and perfume. It seeks to permanently employ the beneficiary in the United States as a watch and clock repairer. The petition requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

A Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition.² The petition's priority date, which is the date an office in the DOL's employment services system accepted the Form ETA 750 for processing, is April 27, 2001. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concluded that the petitioner failed to demonstrate its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward. The director also found that the petitioner failed to establish the beneficiary's qualifying education and employment experience for the offered position as of the priority date.

On January 4, 2013, the AAO dismissed the petitioner's appeal. Like the director, the AAO found that the petitioner failed to demonstrate both its ability to pay the proffered wage and the beneficiary's qualifications for the offered position.

¹ Section 203(b)(3)(A)(i) of the Act allows the granting of preference classification to qualified immigrants who are capable, at the time of petitioning, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act affords the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² The petitioner claims that the original labor certification was lost. It submitted a copy of the labor certification with the petition. The DOL also sent USCIS a duplicate of the labor certification. The duplicate stated a different proffered wage and educational requirement for the offered position than reflected on the petitioner's copy of the labor certification. In its prior decision, the AAO credited the petitioner's copy of the labor certification over the information on the purported duplicate from the DOL. The Board of Alien Labor Certification Appeals (BALCA) also found the information on the petitioner's copy of the labor certification to reflect the offered position's educational requirement and proffered wage. *Matter of Lone Star Perfume & Watches*, 2008-INA-00110, 2009 WL 535489 at *1 n. 3 (BALCA Feb. 26, 2009) (noting that the DOL appeal file appeared to be out of order, with some documents omitted).

On motion, the petitioner submits new evidence of the beneficiary's education and experience qualifications for the offered position. The petitioner also argues that the record establishes the beneficiary's qualifications and its ability to pay the proffered wage.

The petitioner's motion to reopen and reconsider meets the requirements of the regulations at 8 C.F.R. §§ 103.5(a)(2), (3). It states new facts supported by documentary evidence and alleges that the AAO erred in applying law or U.S. Citizenship and Immigration Services (USCIS) policy. The AAO will therefore grant the motion.

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO reviews cases anew, without deferring to previous legal conclusions. *See Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal and motion.³

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must examine the job offer portion of the labor certification to determine the requirements for the offered position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a high school education and 5 years of experience in the offered position. The labor certification also states that a worker in the offered position "must have good checkable references and must be able to speak and read English." The BALCA found the same job requirements for the offered position. *See Lone Star Perfume & Watches*, 2009 WL 535489 at *1.

On the labor certification, the beneficiary claims to meet the offered position's educational requirement based on his studies in Pakistan. The labor certification states that he received a secondary school certificate in 1987, a higher secondary certificate in 1989, and a "Business Commerce" degree from the [REDACTED] in 1993.

The record contains copies of a 1987 Secondary School Certificate Examination and a Statement of

³ The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal and motion. The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on motion. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Marks from the [REDACTED] Pakistan. On motion, the petitioner also submits copies of a 1989 Statement of Marks from the [REDACTED] which shows the beneficiary's purported passage of the annual examination for a higher secondary certificate, and a 1993 Bachelor of Commerce degree from the [REDACTED]

The Electronic Database for Global Education (EDGE), which was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO),⁵ states that a Pakistani secondary school certificate is comparable to "less than completion of senior high school in the United States. May be placed in Grade 11." See <http://edge.aacrao.org/country/credential/secondary-school-certificateschool-leaving-certificate?cid=single> (accessed on Sept. 26, 2013).

EDGE confirms that a marks statement from the Board of Intermediate Education refers to the intermediate certificate exam that results in a higher secondary certificate. EDGE states that a higher secondary certificate from Pakistan leads to tertiary education and is comparable to "completion of senior high school in the United States." See <http://edge.aacrao.org/country/credential/higher-secondary-certificate-hsc-intermediate-certificate?cid=single> (accessed Sept. 26, 2013).

EDGE also states that a Pakistani Bachelor of Commerce degree is comparable to "2 to 3 years of university study in the United States." See <http://edge.aacrao.org/country/credential/bachelor-of-arts->

⁴ On motion, the petitioner also submits copies of the beneficiary's 2006 computer certificate from a private U.S. institution, a 2002 letter from a U.S. Congresswoman, and a 2011 emergency response training certificate from the [REDACTED] Texas. However, these documents, which are all dated after the petition's priority date of April 27, 2001, are not relevant to the beneficiary's educational qualifications for the offered position.

⁵ The AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." See <http://edge.aacrao.org/info.php>. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies. See *Tisco Group, Inc. v. Napolitano*, No. 09-10072, 2010 WL 3464314 at *4 (E.D. Mich. Aug. 30, 2010) (finding that USCIS properly weighed the foreign credential evaluations in the record and information from EDGE in concluding that the beneficiary's foreign degrees equated to only a U.S. bachelor's degree); *Sunshine Rehab Servs., Inc. v. USCIS*, No. 09-13605, 2010 WL 3325442 at **8-9 (E.D. Mich. Aug. 20, 2010) (finding that USCIS was entitled to prefer information in EDGE to the petitioner's evidence and did not abuse its discretion in reaching its conclusion); *Confluence Int'l, Inc. v. Holder*, No. 08-2655, 2009 WL 825793 at *4 (D. Minn. Mar. 27, 2009) (finding that the AAO rationally explained its reliance on information from the AACRAO to support its decision).

ba-bachelor-of-commerce-bcom-bachelor-of-science-bsc-2?cid=single (accessed Sept. 26, 2013). Therefore, if the record establishes that the beneficiary obtained a higher secondary certificate and/or Bachelor of Commerce degree in Pakistan, he would satisfy the educational requirements of the offered position.

The educational certificates, marks statements, and degree of record identify their recipient(s) as [REDACTED]. The secondary school certificate also states that the recipient was born on August 27, 1970. The labor certification, the petition, the beneficiary's application for adjustment of status, as well as copies of his passport pages, an affidavit from his purported father, and a certificate from Karachi city government state that the beneficiary was born on August 27, 1970.

The beneficiary's first name matches the name of the recipient(s) of the educational documents. But other documents in the record - including the beneficiary's adjustment application, passport pages, the Karachi government certificate, and the affidavit from his purported father himself - identify the beneficiary's father as [REDACTED]. The petitioner has not explained why the educational documents identify the beneficiary's purported father as [REDACTED] while other documents in the record identify his purported father as [REDACTED]. The inconsistent names of the beneficiary's father cast doubt on whether the beneficiary received the educational awards in the record and whether he meets the educational requirements for the offered position. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

The secondary school certificate appears to more reliably relate to the beneficiary than the other educational documents because the birth date stated on the secondary certificate matches the beneficiary's birth date. The other educational documents do not contain birth dates or other biographical information that could more reliably link them to the beneficiary. However, even if the AAO found that the beneficiary received the secondary school certificate, that certificate would not establish that the beneficiary possesses a high school education. The AAO therefore finds that the petitioner has not established the beneficiary's educational qualifications for the offered position by the petition's priority date.

On the labor certification, the beneficiary claims to possess the required 5 years of full-time experience in the offered position based on employment in both Pakistan and the United States. The labor certification states that the beneficiary worked in the offered position at [REDACTED] in Pakistan from January 1987 to January 1988 and at [REDACTED] in Pakistan, on a part-time basis for 20 hours per week, from February 1989 to January 1990. The labor certification also states that the beneficiary was self-employed on a full-time basis in the offered position in the United States from May 1996 until the filing of the labor certification on April 27, 2001.

The petitioner must support the beneficiary's claimed qualifying experience with letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. §§ 204.5(g)(1), (l)(3)(ii)(A). "If such evidence is unavailable, other documentation relating to the alien's experience ... will be considered." 8 C.F.R. § 204.5(g)(1).

The record contains letters from the beneficiary's claimed former employers in Pakistan. A March

20, 2009 letter from a partner on [REDACTED] stationery states that the business employed the beneficiary in the offered position from January 1, 1987 to December 31, 1988. A March 25, 2009 letter from the owner/president on [REDACTED] stationery states that that business employed the beneficiary in the offered position from February 1, 1989 to January 1, 1990.

The record also contains an undated, written statement from the beneficiary. He states that he began "freelance work," repairing watches and clocks, in the U.S. in 1996 and continued that work through at least May 2001. On motion, the petitioner submits additional evidence of the beneficiary's self-employment in the offered position, including copies of the beneficiary's U.S. federal income tax returns and invoices for work on watches and clocks.

The labor certification states that the beneficiary worked in the offered position 20 hours per week for [REDACTED] in Pakistan and 40 hours per week for himself in the United States. However, the labor certification does not state how many weekly hours the beneficiary worked for [REDACTED] in Pakistan. The experience letter from [REDACTED] also does not state his weekly hours there. On motion, the petitioner asserts that "[i]t was presumed that since there was no mention of the number of hours worked, or any indication that this was a part-time job, USCIS would have understood that this was clearly a full time 40 hour a week position."

The burden of proof in these visa petition proceedings is on the petitioner to demonstrate the eligibility of itself and the beneficiary for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Form ETA 750 Part B specifically requires the beneficiary to state the "No. of hours per week" he worked at each of his relevant employers. The Form ETA 750 Part B for the beneficiary states the weekly hours for each of his employers, except [REDACTED]. The labor certification states that the beneficiary worked "40" hours per week while self-employed and "20" hours per week for the three employers that immediately precede [REDACTED]. Contrary to the petitioner's argument, the blank space on the labor certification under "No. of hours per week" for [REDACTED] does not establish a presumption that the beneficiary worked full-time, 40 hours per week for that employer. Indeed, because the blank space follows the labor certification's statements that the beneficiary worked 20 hours per week at the three, immediately preceding employers, the blank space suggests similar part-time employment at [REDACTED].

Moreover, the petitioner has failed to demonstrate that the beneficiary worked full-time at [REDACTED]. The assertion of the petitioner's sole proprietor on motion does not establish the beneficiary's full-time employment at [REDACTED] because the record lacks evidence that the sole proprietor had personal knowledge of the beneficiary's tenure there. The AAO's prior decision specifically faulted the labor certification and the experience letter from [REDACTED] for failing to state the beneficiary's weekly employment hours there. Despite receiving notice of these evidentiary defects, the petitioner has not corroborated the claimed full-time employment of the beneficiary at [REDACTED] with documentary evidence. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190, 193 (Reg'l Comm'r 1972))

(asserting facts without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings).

Further, the experience letter from [REDACTED] contradicts the labor certification. The letter states that the beneficiary worked at [REDACTED] from January 1, 1987 to December 31, 1988, about two years. The labor certification, however, states that the beneficiary worked at [REDACTED] from January 1987 to January 1988, or about 1 year. The conflicting dates of employment on the experience letter and the labor certification cast doubt on the true length of the beneficiary's employment at [REDACTED] and the veracity of [REDACTED] experience letter. *See Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence). Thus, the record establishes that the beneficiary's only qualifying employment experience in Pakistan occurred at [REDACTED] from February 1989 to January 1990 on a part-time, 20-hour-per-week basis, which equates to only about 6 months of full-time qualifying experience.

As the AAO indicated in its prior decision, the petitioner must corroborate the beneficiary's written statement of his self-employment experience with independent, objective evidence of the claimed qualifying employment. *See Soffici*, 22 I&N Dec. at 165 (citing *Treasure Craft*, 14 I&N Dec. at 193) (going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings). On motion, the petitioner submits copies of the beneficiary's tax returns from 2000 through 2003 and copies of 20 invoices regarding repairs of watches and clocks from January 2001 through April 2001.

The beneficiary's 2000 tax return states that the beneficiary received all of his \$6,000 income that year as wages from an employer in Alvord, Texas. The 2001 tax return states that he received \$8,453 in capital gains income and \$225 in wages from an employer in [REDACTED] Texas. The beneficiary's 2000 and 2001 tax returns therefore do not support his claimed full-time self-employment in the offered position during those years.

The beneficiary's 2002 and 2003 tax returns cannot establish the beneficiary's qualifying employment experience by the petition's priority date of April 27, 2001. Moreover, the 2002 and 2003 tax returns do not corroborate the beneficiary's claimed self-employment experience in the offered position at all. The returns show that the beneficiary received annual business incomes of \$2,506 in 2002 and \$1,050 in 2003. But they describe the business from which the income amounts derived in those years as "Fleet Market," not watch and clock repairs. In addition, the beneficiary's IRS Forms 1040 U.S. Individual Tax Return for each year from 2000 through 2003 state his occupation as "clerk." Therefore, the copies of the beneficiary's tax returns do not support his claim that he was self-employed as a watch and clock repairer from May 1996 to May 2001.

The copies of the invoices refer to repairs on watches and clocks. But the invoices do not identify the person or business that performed the work or that issued the invoices. Also, the invoices reflect only a 4-month time period from January 2001 through April 2001, a much shorter time period than needed to establish the 5 years of qualifying experience for the offered position.

Further, an employer may not generally include in the offered position's minimum requirements experience that the beneficiary gained while working for it, "including as a contract employee." 20 C.F.R. § 656.17(i)(3). Here, six of the invoices state that the clock and watch repairs were done for [REDACTED] suggesting that the work was performed for the petitioner. Therefore, depending on how much of the beneficiary's purported self-employment experience involved work for the petitioner as a "contract employee," the petitioner might have failed to state the actual minimum requirements for the offered position.

In addition, other documents in the record contradict the beneficiary's claim of full-time self-employment in the offered position from May 1996 to May 2001. A Form G-325A, Biographic Information, which the beneficiary signed on September 5, 2012 and submitted with his application for adjustment of status, states that he repaired computers for an employer in [REDACTED] Texas from January 2001 until January 2008. The beneficiary's resume also states that he worked as a cashier/clerk from 1996 to 1997 and as a manager/cashier from 1998 to 2000. The beneficiary's statements on his resume and the Form G-325A contradict his representations on the labor certification and in his written statement that he was a self-employed watch and clock repairer from May 1996 through May 2001.

The beneficiary's statement on the Form G-325A also appears to conflict with his tax returns from 2001 through 2003, which do not include any W-2 forms in the name of the [REDACTED] Texas employer identified on the Form G-325A. The discrepancies in the beneficiary's statements cast doubt on the veracity of his claimed full-time self-employment in the offered position from May 1996 to May 2001 and his possession of the required qualifying experience for the offered position by the petition's priority date. *See Ho* at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition).

For the foregoing reasons, the AAO finds that the petitioner has failed to demonstrate that the beneficiary possessed the required 5 years of experience in the offered position by the petition's priority date of April 27, 2001.

The petitioner must also establish its ability to pay the beneficiary's proffered wage as of the petition's priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The labor certification states the proffered wage as \$19.17 an hour for a 40-hour work week, or \$39,873.60 per year.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁶ If the petitioner's net income and net current assets

⁶ *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Tongatapu Woodcraft*

are insufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of its business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

As indicated previously, the petitioner is a sole proprietorship, which is a businesses that one person operates in his or her personal capacity. Black's Law Dictionary 1398 (7th ed. 1999). Unlike corporations, sole proprietorships do not exist apart from their individual owners. See, e.g., *Matter of United Inv. Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore, USCIS may consider a sole proprietor's personal income, assets, and liabilities in determining a sole proprietorship's ability to pay.

Sole proprietors report income and expenses from their businesses on Schedules C to their Forms 1040 individual federal tax returns. Sole proprietors must show that they can pay the expenses of their businesses and the proffered wages of beneficiaries from their adjusted gross income or other available funds. Sole proprietors must also show that they can sustain themselves and any dependents while paying their business expenses and the proffered wages of the beneficiaries. See *Ubeda*, 539 F. Supp. at 650.

In the instant case, as evidence of its ability to pay, the petitioner submitted copies of: Three-Year Tax Summaries and Schedules C to the Forms 1040 individual income tax returns of its sole proprietor for 2001 and from 2003 through 2008; copies of monthly checking account statements from January, February, March, May and June of 2009; a credit card account summary for May 19, 2009 through June 17, 2009; automobile and property insurance documents; automobile titles; and various utility bills from 2009. The record also contains a copy of the sole proprietor's complete 2011 personal income tax return, which the beneficiary submitted with his adjustment application.

Other than the six 2001 invoices for clock and watch repairs for [REDACTED] the record does not contain any evidence that the petitioner has employed the beneficiary. The petitioner has therefore not established its ability to pay based on its actual payment of the full offered wage to the beneficiary.

The tax summaries and Schedules C to the Forms 1040 of the petitioner's sole proprietor show the following annual amounts of adjusted gross income: \$25,176 in 2001; \$17,448 in 2002; \$36,708 in 2003; \$33,026 in 2004; \$36,336 in 2005; \$30,172 in 2006; \$30,460 in 2007; and \$31,086 in 2008. Also, the sole proprietor's 2011 tax return shows an adjusted gross income of \$17,075. None of the annual amounts of adjusted gross income stated in the sole proprietor's tax materials equal or exceed the annual proffered wage of \$39,873.60. The sole proprietor's tax returns therefore do not establish the petitioner's ability to pay the beneficiary's proffered wage.

Haw., Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); and *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The monthly checking account statements, credit card account summary, and evidence of the sole proprietor's automobiles and properties show assets only as of the petition's filing in June 2009. These documents do not establish the petitioner's continuous ability to pay the beneficiary's proffered wage from the April 27, 2001 priority date onward.

Similarly, the copies of the sole proprietor's utility bills show his personal expenses as of the petition's filing date, but do not reflect his past or current personal expenses. It is unclear whether the bills even reflect all of his personal expenses at that time. As the AAO stated in its prior decision, the petitioner has failed to submit a statement of the sole proprietor's monthly expenses as first requested by the director in his Request for Evidence of July 8, 2009. *See* 8 C.F.R. § 103.2(b)(14) (the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying a petition).

As indicated previously, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonegawa*, 12 I&N Dec. at 614-15. The petitioner in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner, however, determined that the petitioner's prospects for a resumption of successful business operations were well-established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California.

The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the record shows that the petitioner has been in business since 1989. The petitioner's length of time in business is a favorable factor in assessing its ability to pay the proffered wage. However, the tax records of the sole proprietor show that the petitioner's annual revenues, as of 2011, had decreased about 70 percent from their peak in 2003. Also, in the petition, which was filed in June 2009, the petitioner claimed to employ one worker. The sole proprietor's tax records, however, do not reflect any wages paid to employees, except an amount of \$12,600 in 2004. The petitioner has not demonstrated an outstanding reputation in its industry, nor has it identified any uncharacteristic

expenses or losses that affected its finances. Thus, assessing the totality of the circumstances in this individual case pursuant to *Sonegawa*, the AAO concludes that the petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

Even if the petitioner had established its ability to pay the proffered wages and the beneficiary's qualifications for the offered position, the record is unclear as to whether the petition could be approved. On motion, the petitioner states that the beneficiary has not accepted its job offer. The Form I-290B, Notice of Appeal or Motion, which the sole proprietor signed on February 1, 2013, states that the petitioner's ability to pay the beneficiary's proffered wage is "moot" because "the beneficiary never accepted this job offer." Also, the end of an unsigned, written section of the motion regarding the petitioner's ability to pay the wage states: "The beneficiary did not accept the employment offer therefore this matter is moot."

A petition is properly denied where the petitioner does not intend to employ the beneficiary pursuant to the terms of the labor certification. *Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966); see also 20 C.F.R. § 656.30(c)(2) (2004) (a labor certification remains valid only for the particular job opportunity and the area of intended employment stated on the Form ETA 750); *Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (upholding a petition's denial where the labor certification is invalid under the former regulation at 20 C.F.R. § 656.30(c)(2)).

The petitioner's statements in its motion suggest that it does not intend to employ the beneficiary pursuant to the terms of the labor certification. The record is unclear, however, as to whether the statements mean that the beneficiary has not agreed to permanently work for the petitioner in the offered job, or whether the petitioner mistakenly believes that, because the beneficiary does not currently work in the offered position, it need not establish its ability to pay the proffered wage.⁷ Because of the statements' ambiguity, the AAO makes no findings regarding the petitioner's intent to permanently employ the beneficiary in the offered position or the possible invalidity of the labor certification. In any future filings, the petitioner must clarify the meaning of its statements on motion and, if it intends to permanently employ the beneficiary in the offered position, it must submit supporting evidence of that intent.

In summary, the AAO grants the petitioner's motion to reopen and reconsider. However, the record does not establish the petitioner's continuing ability to pay the proffered wage from the petition's priority date onward and the beneficiary's qualifications for the offered position as of the priority date.

The petition's denial will be affirmed for the above stated reasons, with each considered an independent and alternative basis for affirmance. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act; *Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

⁷ Regardless of whether the beneficiary currently works for the petitioner, the petitioner must establish its continuing ability to pay the proffered wage from the petition's priority date onward. See 8 C.F.R. § 204.5(g)(2).

(b)(6)

NON-PRECEDENT DECISION

Page 12

ORDER: The motion to reopen and reconsider is granted, the January 4, 2013 decision of the AAO is affirmed, and the petition remains denied.